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ENGLISH HISTORY AND THE STUDY OF ENGLISH LAW

RANKE, the Nestor of modern historical research, was wont to say that he only wanted to know how things had happened.[1] Lamprecht, however, more truly indicated the aim and purpose of the investigation of the past when he said that he wanted to know how things had become.[2] Another distinction between the schools which these two men represent is, that one is primarily interested in political affairs, while the other would include within the historical field all phases of social activity. A survey of the course of scholarship during the century just closed, leads to the conclusion that this latter point of view represents the prevailing tendency. History has come to be more than a mere record of political events. Moreover, not only has history, as such, come to be a more inclusive study, but the historical method has invaded the domain of special subjects, and has been applied with advantage to the study of philology, literature, art, economics, law, and theology, not only in their relations to one another, but as independent branches of learning. Modern historical study, however, began with political problems, the impulse being furnished by the questions involved in the revolutionary movements of the eighteenth and early nineteenth centuries, and the far-reaching political and constitutional reconstructions which followed. This helps to explain the attitude of Ranke and his disciples, an attitude which has had powerful advocates in many quarters until comparatively recent times. Freeman, for example, declared that history was only "past

[1] "Ich möchte nur wissen wie es eigentlich gewesen ist."

[2] "Ich möchte wissen wie es eigentlich geworden ist."

politics,"[1] and the late Sir John Richard Seeley professedly regarded historical study as a mere John the Baptist for the study of political science.[2] But the attempts of these men to narrow the scope of their subjects were resisted even in their own lifetime, and would probably be rejected by a vast majority of the younger generation of scholars.

It was only natural to expect that law, both as one of the great branches of human learning, and as a factor, perhaps the most essential factor, in the organic progress of society, should come under the influence of the new tendency. Nay, the historical treatment must be applied to this subject more and more, if it is to grow as a science and not as a mere handicraft. Doubtless the practitioner's first duty is to master the law as it stands today recorded on the statute books, and in the judicial decisions of the country where he lives and works. The accomplishment of this task alone requires long and painful apprenticeship, and, above all, systematic training under skilled and experienced teachers. For preparation of this sort our country offers unequalled facilities. Very early in our history schools began to supplant the office as the recognized place to teach the elements of the subject. Not only has the principle on which they were founded been sustained by their swift and healthy growth;[3] but the excellence of their method has commanded the admiration of leading legal authorities throughout the English-speaking world. Men like Mr. Bryce, Sir Frederick Pollock, and Mr. Dicey have been hearty and outspoken with their praises.[4] But a technical training, however adequate for its particular purpose, does not necessarily constitute a liberal education. A man may know a great deal of present-day law, of medicine, of the various

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[1] His motto; "History is past Politics and Politics are present History," still appears on the cover of each successive number of the "Johns Hopkins University Studies in History and Political Science."

[2] His view is well represented in a little distich which he employs:—

History without political science has no fruit;
Political science without history has no root.

Introduction to Political Science, 1896, p. 4.

[3] The late J. B. Thayer, in an address delivered in 1895, on "University Teaching of English Law," estimated that there were then nearly eighty law schools in the United States, of which nearly seventy were connected with some university. *Harvard Law Review*, IX. 173.

[4] See e. g.: "A Movement in English Legal Education," by Charles Noble Gregory. *Harvard Law Review*, IX. 426.

branches of engineering, or what you will, and still not be a well-rounded scholar. Notwithstanding, the pressure of competition is growing so keen, the requirements of each profession are becoming so exacting that, in spite of themselves, men are being forced to specialize within narrower and narrower limits. The authorities of many universities, seeing their professional schools steadily increasing at the expense of the department of liberal arts, have been obliged to yield to the new tendency, and to modify the old bachelor of arts degree in favor of many technical or quasi-technical studies. Indeed, some radical educational leaders have gone so far as to assert that these studies, as such, furnish sufficient mental culture, equipment, and training for the modern man. But, in spite of such concessions, in spite of a growing disposition to shorten the college term to three years, in spite of the fact that some universities have led the way in requiring a college degree as a condition of entrance to their professional schools, choice or necessity still leads many to enter at once into the study of their specialty. As in the case of other professional men, many a lawyer's higher education will continue to be limited to what he gets in preparing for his vocation.

Such being the fact, it is at least permissible to ask if something cannot be done to make the lawyer more of a scholar within his own field, to broaden his outlook, to interest him in the historic development of the system which he is studying for practical purposes, and to make more evident to him its relationship to the systems of other ages and countries, and to kindred branches of learning. This idea has been suggested and developed more than once during the last half century by both English and American legal scholars. Sir Henry Maine even preached it to a former generation at Oxford and Cambridge.[1] Mr. Bryce, Sir Frederick Pollock, Judge Holmes, and the late James Bradley Thayer have considered it from various points of view, and furthermore, have reinforced and illustrated their arguments by contributions to more than one phase of the subject. The respective merits and defects of the methods employed in the broader and more scientific study of jurisprudence, the metaphysical, the analytic, the historical, and the comparative,

[1] For an appreciative account of his ideals and achievements, see Sir Frederick Pollock's *Oxford Lectures and Other Discourses*, 1890, Lecture VI. "Sir Henry Maine and his Work."

have been weighed and discussed.[1] Leaving out of account all the others, on each of which so much might be said, let us see what the legal student can learn from history, and in particular, from the history of England, the country from which the bulk of our existing system is derived.

Looking back over the centuries it is possible to discover here and there a man impressed with the importance of the historical point of view. For instance, François Baudouin, a leading French jurist of the sixteenth century, was bold enough to declare that without history jurisprudence was blind,[2] and on one occasion delivered himself the following strangely modern sentiment: "Ceux qui ont étudié le droit auraient pu trouver dans l' histoire la solution de bien des difficultés, et ceux qui ont écrit l' histoire auraient mieux fait d' étudier le développement des lois et des institutions, que de s' attacher à passer en revue les armées, à décrire les camps, à raconter les batailles, à compter les morts."[3] As early as 1814 John Beames found it worth while to translate Glanville, and prefaced his work with this significant quotation from Macrobius: *Multa ignoramus quae nobis non laterent, si veterum lectio nobis esset familiaris.* But these are isolated expressions, voices crying in the wilderness. The modern historical school, taking its rise in Germany, cannot be traced back further than the second quarter of the nineteenth century,[4] and its methods met with no acceptance in England till Sir Henry Maine. Even yet its representatives would probably be regarded as false prophets or impractical dreamers by large numbers of English-speaking teachers and practitioners of law.

The question now arises, what benefits may be derived from the study of history and the use of the historical method in the study of law? Gardiner, in the preface to a new edition of the first ten

[1] For example, in Bryce's *Studies in History and Jurisprudence.* 1901, Essay XII. "The Methods of Legal Science," and in Pollock's *Oxford Lectures*, Lecture I. "Methods of Jurisprudence," and Lecture II. "English Opportunities in Historical and Comparative Jurisprudence."

[2] "*Sine historia caecam esse jurisprudentiam*, disait Bandouin." Cited by Maitland, *English Law and the Renaissance*, p. 58.

[3] Ibid.

[4] Friedrich Karl von Savigny, the leading founder of the modern historical school of jurisprudence, began to publish his epoch-making *Geschichte des römischen Rechts im Mittelalter* in 1815, but did not complete it till 1831.

volumes of his monumental History of England[1] in the seventeenth century, has gravely argued the point "whether the knowledge acquired by the historian has any bearing upon the problems of existing society," and concludes that for the practical statesman the bearing is at least indirect. Even if we accept this modest conclusion as equally true in the case of the practical lawyer, much might be said for the study merely for its own sake. As Mr. Edward Jenks eloquently puts it "the study of law as the record of human progress, as the golden deposit of the stream of time, is worthy of the highest intellect and stimulating to the most gifted imagination."[2] Many indeed, impelled by Ranke's curiosity merely to know what has been, would regard a subject as all the more worthy of their attention in proportion as it remained undefiled by utilitarian considerations. For example, one who himself has done much to show the practical value of legal history quotes half approvingly the Cambridge mathematician's praise of his theorem: "The best of it all is that it can never by any possibility be made of the slightest use to anybody for anything."[3] But few, even professed historians, would dare to go as far, at least in public.

Fortunately for the cause here advocated, claims to at least a degree of utility can be advanced. The common law as we know it today in England and America,[4] is the result of a continuous and organic development, every constituent part of which is bone of the bone and flesh of the flesh of something that has existed before. Starting with the rudimentary customs transplanted by our Teutonic forefathers to their new homes in the island of Britain the growth has been so vital that hardly a single member could be taken away without marring the whole body. Over a century ago Blackstone, in treating "of the rise, progress, and gradual improvement of the laws of England," said: "that admirable system of maxims and unwritten customs, which is now known by the name

[1] New York, 1895, I. preface, pp. v-viii.

[2] *Law and Politics in the Middle Ages*, 1898, p. 4.

[3] O. W. Holmes, "Law in Science and Science in Law." *Harvard Law Review*, XII, 444.

[4] Maitland, *English Law and the Renaissance*, pp. 95, 96, n. 73, recites in this connection the following significant extracts from J. F. Dillon, *Laws and Jurisprudence of England and America*, p. 155, "the common law [in distinction from the Roman or civil law] is the basis of the laws of every State and Territory of the Union, with comparatively unimportant and gradually waning exceptions."

of the common law, as extending its authority universally over all the realm, is doubtless of Saxon parentage." Much has been done on the history of English law since Blackstone's time, and many of his historical excursuses have been shown to be misleading or erroneous, but the truth of this statement, although understood and supported in a way unintelligible to him, is now generally accepted.[1] In view of continuity so unbroken it goes without saying that a knowledge of the law of the past should prove of incalculable assistance to the student of the law of today. Judge O. W. Holmes in his acute and learned, if somewhat elusive and esoteric lectures on the *Common Law*, has furnished numerous practical examples of the indissoluble connection between primitive and present principles and practice,[2] and has spoken decidedly and convincingly of the necessity of an historical knowledge in order to explain many obscurities and apparent inconsistencies of modern substantive and adjective law. Frequently, where the logical or analytic method breaks down, a study of the past will supply the answer. His statements on this point are so apposite that I venture to quote them at some length. "The life of the law," he says, "has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with

[1] Cited and discussed by Pollock in his article on "The Continuity of the Common Law," *Harvard Law Review*, XI. 423. Pollock in this same article (p. 425) says: "It is true that the general outlines of a criminal trial might still be recognized by a mediaeval serjeant at law if he could revisit our assize courts." It is interesting to note that Blackstone was widely read by those who contributed to shape our American system. Nearly twenty five hundred copies of his *Commentaries* were sold in the colonies before the Declaration of Independence, John Adams heading the list of subscribers for the first American edition. It was studied by John Marshall, and "inspired" Kent "with awe." J. B. Thayer, "The Teaching of English Law at Universities," "*Harvard Law Review*," IX. 170, and *John Marshall*, p. 6. Extracts are cited by Maitland, *English Law and the Renaissance*, pp. 94, 95, notes 71, 72.

[2] He shows, for instance, that many principles that philosophical jurists would derive from the Roman Law are merely evolutions of early Teutonic practice, c. f., e. g, Lecture V. on "The Bailee at Common Law," and Lecture VI. on "Possession and Ownership." Suggestive sketches on many of these problems may be found in Jenk's *Law and Politics in the Middle Ages*. For an exhaustive treatment of "The Doctrines of English Law in the Early Middle Ages," see Pollock and Maitland, *History of English Law*, Book II.

as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been and what it tends to become. We must alternately consult history and existing theories of legislation. . . . Precedents survive in the law long after the use they had once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view. . . . However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is."[1] It is not uncommon where recent precedents fail for American courts to go back to the middle ages, and even earlier, for material bearing on the point at issue. Not many years ago a case came up in the supreme court of Michigan in which the right of a woman to hold the office of prosecuting attorney, to which she had been elected in a certain county, was contested.[2] The judges found it stated in Campbell's *Lives of the Chief Justices of England*, that beside the well-known instances of female sovereigns, women had held such seemingly unfeminine positions as sheriff of Westmoreland and champion of England. Application was made to the history department of the University of Michigan for confirmation. The instances, hereditary offices in each case, are perfectly familiar to any student of English constitutional history. Although the case was finally decided against the woman, the introduction of remote historical precedents is significant.

An historical knowledge, then, of seemingly archaic customs, procedure, and precedent can at times be of actual specific use for present purposes. Less direct, but none the less real, is the value to be derived from the method of dealing with problems which a proper historical training is bound to foster. The smug philistinism which cares not to look behind, away from, or beyond the circle of its present interests and occupations would probably find few serious defenders. But minds unversed in historic thinking often

[1] *The Common Law*, 1881, pp. 1, 35, 37.

[2] Attorney-General *v.* Abbott, 121 Michigan, 540-569.

unconsciously show a dogmatism, an apriorism, a lack of sympathy, when they come to deal with questions of any scope. Jeremy Bentham showed it, John Austin showed it, and their limitations were not merely personal, but rather a characteristic of their time. It was seen in law and politics, in literary criticism, in the social sciences, it was seen everywhere. A great break had been made with the past, and changes had been so vastly for the better that men were hugging themselves with pharasaical complacency and offering thanks that they were not as their ancestors had been. Had this attitude continued for any length of time it would have seriously hampered future scientific progress. In shaping measures of reform, and in formulating fundamental principles there was a tendency, on the part of practical man and thinker alike, to lose sight of the relativity of all advance, to forget that theirs, although an important step, was after all only a step in the march of progress. They came to think that their measures and views, in so far as they were best and right for that age and country, were and would continue to be best and right for all ages and countries. An interesting example may be seen in the case of the social sciences in general and of economics in particular. In 1776 Adam Smith published his *Wealth of Nations* which struck a death blow at the already falling system of mercantilism. As years went on one old notion after another was discarded until even so enlightened a scholar as John Stuart Mill was tempted to believe that he could construct a system of political economy, to the basic principles of which almost everybody would agree. But the history of thought on the continent was already beginning to show that such apparently substantial structures were built on sand. In 1839, Auguste Comte published his *Philosophie Positive*, and in 1843 Wilhelm Roscher followed with *Grundriss zu Vorlesungen ueber die Staatswirthschaft nach geschichtlicher Methode*, and from the impulse thus set in motion, a new school arose whose service was to show that nothing can be absolute, but that measures of public policy, individual conduct, and even of scientific principles, where the human element enters in, must be judged in respect to time, place, and conditions whence they came.[1] This new view point came, in

[1] See J. K. Ingram, *A History of Political Economy*, 1894, chapter VI., "The Historical School," and the preface by E. J. James. In a suggestive paper entitled, "Ethical Values in History," *American Historical Review*, ix. 233-246, Mr. Henry Charles Lea has shown, with

course of time, to affect the scientific study of jurisprudence to which a historical bent had already been given by Savigny.

Another limitation of the purely technical lawyer, true for all time, which the historical method might tend to correct, is his narrowness, his attachment to the letter at the expense of the spirit. Doubtless, in the case of the advocate and the judge, this is a source of strength rather than of weakness; for their primary business is to declare what the law is, not what it ought to be. But it has always happened, both here and in England, that a goodly share of the business of legislation and administration has fallen to the men of legal training, and there have been times in English history when the action of the judges has had important political consequences. A notable instance is the struggle which Coke and the common law judges led against James I. in his attempts to make them servants to the royal prerogative, and to limit the jurisdiction of their courts at the expense of Chancery, the court of High Commission and the Star Chamber. In their courageous and determined stand against arbitrary authority they contributed much to the cause of liberty and progress, but the methods that they used, and the claims they put forth showed that their training had not fitted them to grapple with broad issues.[2]

Few would claim that a study of history alone would fit the legislator or the administrator for the work he is called upon to do. Indeed, attempts to read the present in the light of the past, often fail signally. But the attitude of mind which such studies foster, the sense of relativity, of catholicity, the breadth of vision, and the ability to profit by the experience of what has been, cannot be without its value.[3] It must be admitted, that for the lawyer and

particular reference to the character of Philip II. of Spain, the futility and injustice of setting up any absolute and universal standards of judgments. Another instance may be found in Mr. John Pollock's admirable study, *The Popish Plot*, 1903, of certain English political trials of the seventeenth century, frequently condemned by modern critics for their harsh injustice. He brings out the necessity of studying them in the light of contemporary conditions, of keeping in mind the fact that the state was menaced by grave and imminent dangers from without and within, with no standing army, and no police system for preserving the public security. Obviously, in such a situation, the procedure of the judges and the courts must be estimated by standards quite different from those that would be applied by one versed only in the methods of our present practice.

[2] Gardiner, *History of England*, II. 35-42; III. ch. XXII., passim.

[3] See Gardiner, *History of England*, 1895, Vol. I. preface, v-ix, to which reference has already been made in another connection.

the judge in his particular work, history is not without grave dangers. Rarely will it furnish the information necessary to win or decide a case. Here, where exactness rather than extent of knowledge, keenness rather than breadth of vision are most essential, too much attention to remote custom and conflicting systems may tend to dazzle rather than to enlighten, to confuse the mind and clog the activity. Moreover, historical and speculative curiosity, once aroused, may lead to endless antiquarian ramifications, or involve the unwary student in limitless journeys through the complicated paths of related sciences. Mr. Bryce[1] has foreseen and discussed all this in one of his sane and luminous essays, but his final word on the point is encouraging: "Arguments," he says, "founded on the reason of things or on the tendency of historical development will avail nothing in practice against a positive rule, whether contained in a statute or deducible from a decided case. Seldom indeed will a judicious advocate invoke either Reason or History, unless perhaps in arguing before the House of Lords a point whereon little authority exists. But in reasoning from decided cases, and even in interpreting statutes, his mastery of the methods already described will stand him in good stead. Nor is it to be forgotten that the judge and the writer of text-books have, each of them, important functions in guiding the development of the law. When a question is to be dealt with, regarding which authority is scanty or the decisions are conflicting, a jurist belonging to either of these classes may apply the philosophic habit of mind formed by his theoretic studies to the task of finding a solution which shall be sound and durable, because conformable to principle, and standing in the true line of historical development." In a word, history, beneficial both for the knowledge which it furnishes and the training it affords, may prove detrimental when misused or inopportunely applied.

Aside from any value which the study of history or the use of the historical method may have for the members of the legal profession, the study of the growth of English law and legal institutions should be to them a subject of peculiar interest. The labors of two generations of keen and learned investigators have discovered much that is new and have pruned away many old errors imbedded in the historical excursuses of legal text-book writers from Black-

[1] Bryce, *Studies in History and Jurisprudence*, 1901, pp. 627, 628.

stone down. Not only can much be learned from what has already been brought to light, but much remains to be done, and a wide field of opportunity is open to legally trained students. The formative period, particularly the dim age that lies on the other side of the reign of Edward I., is systematically studied in very few of our universities; professional courses, as a rule, hardly reach back that far even for precedents, and the ordinary college course in narrative English history touches the subject only incidentally. But it is only by a mastery of this period that we can understand how our present system originated. With a view to showing how it came to be, the shadowy beginnings, the slow and painful steps in the growth, the dangers and crises met with in the way, the results achieved, often far from the original intention of those to whom they were due, I have ventured to sketch some of the more significant stages. All this is well known to the specialist; but it may serve to direct the attention of others to problems seemingly without the pale of their immediate practical concerns.

The ancient Teutonic customs and procedure which our Anglo-Saxon forefathers brought with them and developed in English soil are almost unintelligible in their contrasts to our modern principles and practice. Law was not then a collection of statutes and precedents recorded in writing, and declared, interpreted, and enforced by public officials. It was merely the general sense of the community, a series of customs vague and undefined. Indeed, our ancestors had only partially shaken off the old practice of self-help when they reached their new home; and the state—if that name can be applied to the chiefs and assemblies of the various bands of settlers scattered here and there throughout the land—was only feebly intervening to keep the peace and help the individual. There was no machinery to summon an offender before the periodical meetings of the hundred and shire; the injured party had to see to it himself that his adversary was brought to justice. The assembled community declared the law; for the presiding officer was in no sense a judge. No evidence was needed to convict the offender; as a matter of fact, witnesses were never summoned except to reply to a set formula, or to testify as to the general character of the accused. If the accused refuted the charge, the whole body of assembled suitors prescribed the form of trial or the method of proof by which he should clear himself. If he were specially fortunate or a man in good repute,

the testimony of a group of compurgators might be sufficient. Otherwise he went to the ordeal; he might be forced to draw a stone from a vessel of boiling water, or to carry a bar of red-hot iron a specified number of steps. If the hand or arm healed within a certain time he was innocent. Or, less frequently, he might be plunged into a pond or river on the superstition that pure water would not receive a guilty person; in this case the unfortunate was almost literally placed between the devil and the deep sea. The easiest test was the corsned, or sacred morsel, quite characteristically the one most used for those in clerical orders. It required merely the ability to swallow a bit of bread or cheese at a single gulp without perceptible ill effects. In those days there was no evidence as we understand it, the burden of proof rested on the accused; but rumor counted for much, and fancied manifestations of the divine will for still more. As time went on the little tribes consolidated into seven or eight petty kingdoms, and these in turn were gathered under the supremacy of a single ruler. But no sooner was this union accomplished than new disintegrating forces began to assert themselves, in the person of the great local magnates. In consequence, a centralized system of justice never developed during the Anglo-Saxon period: the king's peace, beginning as a special protection in the case of certain persons, and over certain places, at certain seasons, hardly succeeded in extending itself over the whole land. Properly speaking, there was no appeal from a local court after sentence had once been given. But where justice was denied in the first instance the party might seek redress from the king and his wise men, whose original jurisdiction extended only over great men and certain great causes. But if Anglo-Saxon methods were crude and irrational, if particularism and confusion prevailed at the expense of unity and simplicity, the popular element was strong and vital, so strong and vital that it has ever remained a basic element in English law and government.[1]

The Norman conquest brought many consequences in its train. Preserving what was best in the Anglo-Saxon polity, its free local institutions, the new line of kings was able to counteract the old disruptive tendencies, to fashion a firm and coherent texture of centralized institutions, and to bind the pre-existing elements

[1] For a bibliography of works dealing with Anglo-Saxon courts, police, and legal procedure, see Gross, *Sources and Literature of English History*, 1900, §§ 40, 45.

securely within it. By a curious anomaly England owes its improved system of procedure, its methods of securing speedy and rational justice, to an alien dynasty working in the interests of absolutism. Trial by jury, the palladium of English liberty, and long regarded as an Anglo-Saxon heritage was, as Maitland has put it in his matchless way, "in its origin . . . rather French than English, royal rather than popular, rather the livery of conquest than the badge of freedom."[1] It has been one of the achievements of modern scholarship to trace the true origin and growth of what is now the most characteristically English of English institutions. Starting from the inquest, an administrative device of the Frankish emperors, who sent round officials to gather information on the sworn testimony of the communities they visited, the system, much developed on French soil, was brought to England by William the Conqueror from his Norman home. He and his Anglo-Norman successors employed it for various purposes, among other things in litigation where the royal interest was involved. At first allowed to privileged subjects as an exceptional favor, Henry II. first brought it into general use in the royal courts as a means of outbidding the rival jurisdictions he was trying to break down.[2]

Another consequence of the Conquest was the introduction of feudalism with its far-reaching legal and constitutional effects. Its origins and many of its characteristics were only inadequately and even incorrectly treated by the classic legal writers. Not till very recently has it been possible to obtain in English a satisfactory account of the beginnings and gradual rise of the system on the continent, without a knowledge of which the English development cannot be thoroughly understood.[3] Strangely enough, although

[1] "English Law under Norman Rule," in Traill, *Social England*, I. 285.

[2] The first to demonstrate the Frankish origin of the jury was Heinrich Brunner, *Die Entstehung der Schwurgerichte*, 1871. The best work on the subject in English is J. B. Thayer's *Preliminary Treatise on Evidence at the Common Law*, part I, 1898. Professor C. H. Haskins has recently published a scholarly study on "The Early Norman Jury," *American Historical Review*, VIII. 613-640.

[3] The best English treatments of the subject may be found in G. B. Adams' *Civilization during the Middle Ages*, 1894, chapter IX, and Charles Seignobos' *The Feudal Regime*, 1902, translated by E. W. Dow, from Lavisse and Ramband's *Histoire Générale*. Mr. Adams, *American Historical Review*, VII. 11-35, and Maitland, *Domesday and Beyond*, 150-172, 300-313, discuss the elements of feudalism among the Anglo-Saxons. Mr. J. Horace Round, in a chapter on "The Introduction of Knight Service into England," *Feudal England*, 1895, pp. 225-314, presents some interesting conclusions regarding the innovations of William the Conqueror.

feudalism was a disintegrating force in the countries of continental Europe, the Anglo-Norman and the early Plantagenet Kings were able to make it a source of strength and a potent factor in unifying the law. Abroad each great seigneur came to be a law unto himself, administering his own justice, leading his own armies, and collecting his own taxes. In England the chief seigneur was the king. In addition to his powers as sovereign of the English people, he was supreme landowner and suzerain of vassals bound to him by feudal ties. As such, he was able to draw many new cases into his court and to encroach seriously upon the local jurisdictions. The new system of land tenure, with its accompanying incidents of taxation and other obligations, has left its mark upon our existing laws.[1]

The profound effect of feudalism upon the English constitution and upon the fundamental rights and liberties of all English-speaking people is not yet generally recognized. The Magna Carta, to which many of these rights and liberties trace their source, owes its form and origin largely to this institution. The movement which forced this memorable series of concessions from King John was led by the barons driven to action by the King's violation of the basic principle of their feudal relation to him, the principle of contract—of reciprocal obligation between lord and vassal. The observance of this principle is insisted on in the three underlying provisions of the Great Charter: that there should be no taxation of the feudal community, beyond the customary feudal aids, without the consent of those concerned, the great council of the king's tenants-in-chief; that there should be no violation or modification of the law by the arbitrary action of the King; that the barons should have the right of enforcing this agreement by force of arms and by the temporary deposition of the King if necessary.[2] To take a specific illustration: the feudal character of the Magna Carta can be shown in one of its measures which seems most popular. The celebrated XXXIXth. clause provides that "No free man shall be taken, or imprisoned, or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers

[1] The feudal tenures are described in great detail in Pollock and Maitland, *History of English Law*, 2nd ed. I. Bk. ii. ch. i.

[2] The significance of the feudal principle of contract as it affected the English constitution in the XIIIth century is ably discussed by Professor G. B. Adams in an article entitled "The Critical Period of English History," *American Historical Review*, V., 643-658.

or by the law of the land." Historians of the period are now agreed that the framers of this article did not intend it to guarantee trial by jury, as was formerly believed, but rather to safeguard the barons against being judged by their inferiors in rank, notably the judges of the King's courts. It was fortunate for English liberty that feudalism was strong enough before its final disintegration as a political institution to inoculate its most vital principles into the body politic. It must be borne in mind, of course, that the barons did not work alone; they had to call in the church and people to aid them, and, in consequence, to secure ecclesiastical and popular as well as baronial concessions. For that reason the Magna Carta is more than a merely feudal, it is a national document. However, if it had not been for the feudal lords struggling in their own interests, the course of English history and the form of the English constitution might have been something quite different.

But both before the movement against John and his son, Henry III., and after Edward I. had ascended the throne, prepared to recognize the restrictions placed upon his prerogative, the action of the crown in shaping the growth of the law was altogether salutary: mainly through the efforts of successive sovereigns it became territorial rather than personal, the law of England rather than the law of Kentishmen, Mercians, or West Saxons, it was the royal power that broke down the special privileges, that rationalized and unified conflicting customs, that introduced trained judges, organized courts, improved methods of procedure, in short, that constructed that system of common law and the methods of administering it which it has been the work the last six centuries to perfect only in detail.[1]

In this process of development the reign of Henry II. marks an epoch; in the words of Pollock and Maitland it was truly "a critical period in the history of English law."[2] Not only were far-reaching reforms undertaken, but the momentous fact was determined that the law of the land should be English and not Roman. William I. and his sons introduced many innovations. The reign of Henry I., particularly, was most fruitful in beginnings. Under the direction of Roger of Salisbury, who had first recommended himself to the astute Henry by the celerity with which he said

[1] For a brief outline of the course of development see Jenk's *Law and Politics*, ch. iv.

[2] For the legal significance of the reign of Henry II. see Pollock and Maitland, *English Law*, I., ch. vi.; for the growth of the Roman Law, ibid, ch. i. and v.

mass on one of the prince's hunting trips, the Curia Regis and the Exchequer were organized and itinerant justices began to be sent out to represent the crown and to transact its business in the local jurisdictions. But the structure, still in building, was demolished during the anarchy of Stephen's reign, and Henry II. had to begin practically from the foundation.

Although his reign is so notable from the legal standpoint, Henry's primary aim was political, to strengthen the royal power at the expense of the church and the barons. An essential step in this undertaking was to make the King's justice supreme throughout the land. To this end he reorganized, strengthened, and consolidated the old courts, established new ones, sent his judges into the local and special jurisdictions, and, as a means of outbidding his rivals, introduced novel and improved methods of procedure in criminal and civil causes. As a result, before the close of his reign, the King's courts and judges, instead of being exceptional resorts for great men and great causes, had come to exercise, regularly and normally, a vast and steadily increasing jurisdiction. All this was very significant for the future of English methods. When Henry and his judges began their work, law and procedure were as yet confused, conflicting, and disorganized. Anglo-Saxon law was still administered in the hundred and county courts. Aside from private and inadequate compilations, the law was still unwritten, and the Anglo-Norman officials who administered it, even though they might be willing to respect local customs, understood them imperfectly at best. Manorial, borough, and other special courts enjoyed great exemptions, franchises, and privileges. Obviously, if the royal power continued to increase, it would seek to bring order out of this chaos. And if a more logical and uniform system could not be fashioned out of the existing native elements, help might be sought elsewhere. Beyond the Alps, just at this time, a code, long moribund, was coming to life again, a code that, from its cosmopolitan character, its logical and rational arrangement, was admirably suited to meet the needs of the youthful countries of western Europe.

The Roman law codified by Justinian in the sixth century, was a fusion of the practices and principles of a people of unparalleled legal genius, and of unparalleled administrative experience. But this comprehensive fabric of prætorian edicts, of treatises of jurists, and enactments of imperial legislators, had practically dropped

into oblivion during the period which marks the formation of the new Germanic states on the ruins of the western empire. The twelfth century, however, witnessed a great revival; as early as the year 1100 Irnerius was lecturing at Bologna. Students began to flock to Italy, and, as time went on, doctors of law gradually made their way to France, England, and the German Empire. In the reign of Stephen we find Vacarius teaching in the household of Theobald, Archbishop of Canterbury. This same twelfth century also marks an epoch in the development of the canon law, for between 1139 and 1142 Gratian published his celebrated *Decretum* or *Corpus Juris Canonici*. In the thirteenth century the Roman law established a permanent foothold in France, and became a powerful support to the growing monarchy. In the fifteenth century we find it domiciled in Germany, much distrusted by the masses, according to a current jingle:—

"Das alte recht ist worden krank;
Die armen kurz, die reichen lang."

Scotland, also, to a large degree, took up the new system; but, except in the ecclesiastical and chancery courts, it never got any considerable or abiding hold on England. And it is due to the work of Henry II. that it did not. In the other countries no single system existed able to dispute the superior claims of the intrusive guest. But Henry II., in his efforts to make his authority supreme and absolute, so simplified and unified divergent practices, and so thoroughly succeeded in making the custom of his courts the law of the land, that by the time the civil law was in a positon to make itself felt in the island, the common law was too widespread and too firmly grounded to be supplanted by any alien rival.

The story of how Henry did his work is too long, and the details are too technical to be told here. Those who wish to know it must turn to the constitutional and legal historians of the period, or better still, to the treatise of the contemporary Glanville, and to those remarkable assizes which survive as enduring monuments of the reign. But we may venture to glance at one or two points. Henry recognized that if his system of justice was to prevail, it behooved him to introduce more expeditious and efficacious methods than those already in vogue. It is only necessary to study his measures to understand how completely he outbid his competitors. His celebrated possessory assizes, the darrein presentment, the mort d'

ancestor, and the novel disseisin enabled men to determine their rights of possession against an intruder by forms of procedure more summary than had ever before been dreamed of. By the grand assize it was first made possible to defend a title by the rational testimony of those who knew the facts of the case, and to avoid the brutal and inconclusive trial by combat. By the introduction of the presentment jury criminals were brought to account by a body of men sworn to voice the common report of the vicinage, and, in consequence, compurgation faded into a legal archaism. By the original writ, cases were drawn into the royal courts, courts which, in spite of their many shortcomings, gave speedier and more impartial hearings than those whose jurisdictions they invaded.[1]

The methods of procedure introduced by Henry II., and the steps by which they were perfected in succeeding centuries form a most interesting study. The old assize[2] which he introduced, and the early forms of jury which superseded it, were strikingly different from the body familiar to us. Members were at first chosen for their knowledge of the facts in the case to be decided, though gradually they came to supplement their personal knowledge by information acquired by a private examination of documents and of men not on the panel. The separation of the witnesses from the jurors was a process of slow growth; for it was not till the fifteenth century that the former came to testify in open court. It should also be noted that the earliest trial juries dealt only with civil cases, in criminal cases the jury introduced by Henry II., and employed under his two successors, was concerned only with the presentment or accusation of offenders whose ultimate fate was still decided by the ordeal. But this form of test practically disappeared after Innocent III., by a decree of the Fourth Lateran Council in 1215, forbade the clergy to participate in trials where it was used. So under Henry III. we find new juries introduced to decide on the truth of the facts presented by the accusation jury.[3] However it rested with the accused whether or no he would put himself on his country. Often the felon, sure of his condemnation, rather than have it formally

[1] The stages of development from the earlier to the later form of jury are traced in detail by Thayer in his *Preliminary Treatise on Evidence.*

[2] The term "assize" can be used in at least four senses: For a royal enactment, for a form of trial, for an early form of jury, and for a judicial session.

[3] Oftentimes, however, the new jury might be the original body of accusers acting in another capacity.

declared, would submit to the terrible *peine forte et dure*, only abolished in 1772, in order to save his goods for his family. It is characteristic of English conservatism that the old forms of procedure remained on the statute book long after they had become practically obsolete; trial by battle and compurgation were not abolished by law till 1819 and 1833 respectively.

The history of the origin and development of the law courts in the interval from Henry II. to Edward I. is another subject full of interest; for it is during this period that they took the form that they substantially retained down to the great reforms of 1873-1875.[1] Henry II. restored the Curia Regis and the Exchequer originally founded by Henry I. When, in 1178, he marked off from the former a body of two clerks and three laymen to hear cases in which the king was concerned and those of such subjects as he chose to admit to his tribunal, he created the parent of two of the historic common law courts. The distinction between the King's Bench and the Common Pleas, which Henry established as a single court, is first made evident by the clause in the Magna Carta providing that "the common pleas shall not follow our court, but shall be held in some certain place." Together with the exchequer, these two courts went on developing through the thirteenth century until their identity is finally established, when in the reign of Edward I., each begins to have its separate plea roll. It is from this same century that we trace the rise of Chancery, a form of equitable jurisdiction growing out of the custom of referring to the king and his councillors cases for which the stiff and inelastic system of the common law provided no remedy.

It would swell this article beyond reasonable limits to attempt even to touch on the legal significance of the reforms of Edward I., and the course of development since his time. Moreover, the subsequent growth of the law is too closely bound up with the study of the various branches of our present system to make necessary a plea for its importance.[2] The case is admirably stated by Pollock and Maitland in explaining their reasons for bringing their history to a close at this point:

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[1] The most recent and exhaustive work on this subject is W. S. Holdsworth, *A History of English Law*, 1903, Vol. I.

[2] Much curious information concerning the later developments on the criminal side of the law may be found in L. O. Pike's *History of Crime in England*, 1873-76, and Sir J. F. Stephen's *History of the Criminal Law in England*, 1883.

"So continuous has been our English legal life during the last six centuries, that the law of the later middle ages has never been forgotten among us. It has never passed utterly outside the cognizance of our courts and our practicing lawyers. We have never had to disinter and reconstruct it in that laborious and tentative manner in which German historians of the present day have disinterred and reconstructed the law of mediæval Germany. It has never been obliterated by a wholesale 'reception' of Roman law. Blackstone, in order that he might expound the working law of his own day in an intelligible fashion, was forced at every turn to take back his readers to the middle ages, and even now, after all our reforms, our courts are still from time to time compelled to construe statutes of Edward I.'s day, and, were Parliament to repeal some of these statutes and provide no substitute, the whole edifice of our land law would fall with a crash. Therefore a tradition, which is in the main a sound and truthful tradition, has been maintained about so much of English legal history as lies on this side of the reign of Edward I. We may find it in Blackstone, we may find it in Reeves, we may find many portions of it in various practical text-books. We are beginning to discern that it is not all true; at many points it has of late been corrected. Its besetting sin is that of antedating the emergence of modern ideas. That is a fault into which every professional tradition is wont to fall. But in the main it is truthful. To this must be added as regards the material for this part of our history we stand very much where Blackstone stood. This we write to our shame."[1]

In concluding this statement the learned authors put in an eloquent plea for a better edition of the year books, that remarkable series of reports of cases in French, supposed to be official, extending from 1292 to 1535, in which, as Professor Gross aptly says, so "much legal and constitutional history lies buried." The only edition anything like complete is a faulty one of the seventeenth century. However, certain hitherto unpublished books have been issued, with translations, in the Rolls Series, and the Selden Society purposes to issue those of Edward II.[2] Here and in the series of English legal classics now being issued by an American

[1] *History of English Law*, 2nd ed., Vol. I., introduction, pp. xxxiv–xxxv.

[2] Gross, *Sources and Literature of English History*, 353, 358. Vol. I. of the Selden Society's series has already appeared under the able editorship of Professor Maitland.

publisher[1] a legal scholar with a turn for original studies might find promising points of departure for future work.

It has been the purpose of this article to urge upon the student of law and the practitioner that history may be of use and interest to him. History, we have insisted, is not a mere congeries of dates and facts, but an inclusive record of all human thought and activity. While there is, properly speaking, no such thing as ecclesiastical, economic, legal, or political history, there are ecclesiastical, economic, legal, or political aspects of history, each of which may be studied by itself, or in its relation to the whole. From either or both standpoints the historical study of the law should appeal to every student of the profession. It may help him to understand much in his ordinary practice that would otherwise seem vague and inexplicable, it will certainly give him that broad outlook which distinguishes the educated man from the skilled craftsman, and, finally, what in itself should be a sufficient reward, it will tell him the strange and fascinating story of how the law which he knows emerged from the shadowy regions of the past, and perhaps inspire him to do his part to dispel the gloom which still envelops many stages of the progress.

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[1] John Byrne and Company. Glanville, Littleton's *Tenures*, Britton, and the *Mirrour of Justices* have already appeared. Bracton's *De Legibus*, was edited with translation for the "Rolls Series" in 1878-83, by Sir Travers Twiss, and what is thought to be his note-book, a collection of cases decided in the King's courts during the reign of Henry III., by F. W. Maitland in 1887.